

In The Matter Of:

***THE FAIRCHILD CORPORATION vs. ALCOA CORPORATION vs.
ALCOA CORPORATION***

ARBITRATION
February 27, 2007

MERRILL LEGAL SOLUTIONS

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New York, NY 10170

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ARBITRATION - Vol. 7

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CPR INSTITUTE OF DISPUTE RESOLUTION

-----x
In Re
THE FAIRCHILD CORPORATION
Claimant,

-against-

ALCOA CORPORATION,

Respondent.
-----x

Cravath, Swaine & Moore, LLP
Worldwide Plaza
825 Eighth Avenue
New York, New York
February 27, 2007
9:15 a.m.

B E F O R E:
JAMES F. STAPLETON, Arbitrator

TAMMEY M. PASTOR, RPR, CLR, Hearing Reporter

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MICHAEL HODGE - DIRECT

MS. ROY: We would like to call
Michael Hodge as our next witness.

MICHAEL HODGE,
having been first duly sworn by the Notary
Public (Tammey M. Pastor), was examined and
testified as follows:

DIRECT-EXAMINATION BY MS. ROY:

Q. Can you please state your name for
the record.

A. Bartholomew Michael Hodge.

Q. At one point were you employed by
the Fairchild Corporation?

A. Yes, I was.

Q. In what capacity?

A. I was an assistant general counsel
from 1992 until about 2003, February. And after
that for about a year and a half I worked
part-time as a consultant for them.

Q. Let's go back for a moment. Can
you describe your educational background for us.

A. Yes. I have a BA from Stanford
University in 1973. From there I went to the
State University of New York at Buffalo where I
got an MA and Ph.D. in English. I then taught

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PROCEEDINGS

APPEARANCES:

CAHILL, GORDON & REINDEL LLP
Attorneys for FAIRCHILD CORPORATION
80 Pine Street
New York, New York 10005

BY: ADAM ZUROFSKY, ESQ.
TAMMY L. ROY, ESQ.
ANDREW MADAR, ESQ.
-and-
ELIZABETH RICHMAN, ESQ.

CRAVATH, SWAINE & MOORE, LLP
Attorneys for ALCOA CORPORATION
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019

BY: EVAN CHESLER, ESQ.
DANIEL SLIFKIN, ESQ.
STEPHEN E. FRANK, ESQ.
JEREMY WINER, ESQ.
-and-
MARCUS J. GREEN, ESQ.

ALSO PRESENT:

MEREDITH SHAW, CRAVATH, SWAINE & MOORE, LLP
JESSICA SILVERMAN, CRAVATH, SWAINE & MOORE, LLP
SARA BRAUNER, CAHILL GORDON & REINDEL LLP
MARK A. BARTHOLOIC, ESQ., ALCOA

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MICHAEL HODGE - DIRECT

for four years at Virginia Tech and left there
to go to law school at University of Virginia
graduating with a JD in 1984.

Q. After graduation from law school
did you practice law?

A. Yes, I did.

Q. Where did you practice law?

A. First with a smallish firm in
Washington D.C. called Collier Shannon Rill &
Scott. I was there for about four years. Left
there to go to another Washington firm which was
Crowell & Moring, also for about four years.
Then I went in-house at the Fairchild
Corporation.

Q. Did you specialize in any area of
law during your employment at the law firms you
mentioned?

A. Yes. I was an environmental
attorney.

Q. What type of work did that entail?

A. Basically anything dealing with EPA
and the statutes that they administered.
Earlier on with the law firms did a lot of trade
association work in terms of regulatory work

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MICHAEL HODGE - RECROSS

Q. So even though it is your position that investigations weren't covered at all, you still expected Alcoa to notify you of everything that was going on?

A. Okay, Phase II investigations were not covered under my interpretation. Alcoa was under a general obligation in terms of making claims under the indemnity provision to provide Fairchild with information of investigations that they might conduct, remedial actions they might take, discussions, investigations with -- discussions with regulators, so on and so forth. Okay.

That was a general information requirement that Alcoa, information provision requirement that Alcoa Corporation had. That's separate from the actual Phase II reports themselves.

Q. If I understand you right you're saying Alcoa had to give all the information about the investigations to Fairchild even though Fairchild wasn't going to pay for them?

A. Yes.

MR. SLIFKIN: I have no further

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DONALD MILLER - DIRECT

DIRECT-EXAMINATION BY MR. ZUROFSKY:

Q. Mr. Miller, good afternoon. What is your current position of employment?

A. Executive vice president and general counsel of the Fairchild Corporation.

Q. How long have you held that position?

A. I have been executive vice president since 1998 or '97. I have been general counsel since January 3, 1991.

Q. And, to whom do you report?

A. I report to the Chairman and CEO Jeffrey Steiner.

Q. How long have you done business -- how long have you known Mr. Steiner?

A. Well, I have been general counsel at Fairchild for 16 years. Before that I was in private law practice for 17 years. And I met Jeffrey Steiner at some point during my private practice and represented him probably for five or six or eight or ten years, I don't recall.

Q. As general counsel and executive vice president what are your responsibilities at the Fairchild Corporation?

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DONALD MILLER - DIRECT

questions.

MS. ROY: I have nothing.

THE ARBITRATOR: Thank you very much, Sir. You are excused.

(Witness excused.)

(Luncheon Recess: 1:15 p.m.)

AFTERNOON SESSION

2:00 p.m.

DONALD MILLER,

having been first duly sworn by the Notary Public (Tammey M. Pastor), was examined and testified as follows:

MR. ZUROFSKY: Our next witness will be Mr. Donald Miller. Just sort of it has been a couple weeks, if you will recall Mr. Miller is the witness that after your Honor's interim ruling on interim summary judgment motion we sought leave for him to give some evidence surrounding the scope of whether or not it covered health and safety. We will be limiting our examination to those topics per your Honor's direction during the ruling. Other than background and things like that.

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DONALD MILLER - DIRECT

A. I am the chief legal officer of the Corporation. I am a senior officer and I am involved in all of the transactional work of the company.

Q. Do you have a specialty in transactional work?

A. Yes. M&A.

Q. You are not an environmental lawyer per se?

A. I am not an environmental lawyer.

Q. I assume there are a lot of different legal issues that report up to you, not just environmental type issues; is that right?

A. That's correct.

Q. Have you in connection with your work in transactions, have you been involved in the negotiation of acquisition transactions in the course of your career?

A. Yes, many.

Q. How many would you say approximately?

A. 200.

Q. Was one of those transactions the

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1 DONALD MILLER - DIRECT
 2 transaction by which Alcoa purchased the
 3 Fasteners business from Fairchild?
 4 A. No.
 5 Q. You were not involved in that?
 6 A. That was a disposition. You asked
 7 acquisition.
 8 Q. All right. Disposition. Fair
 9 enough. You were involved in that transaction?
 10 A. I was.
 11 Q. Why don't you describe your role
 12 for me in that transaction if you could.
 13 A. I conducted the negotiations on all
 14 issues except for purchase price issues which
 15 were handled directly by Jeffrey Steiner. I led
 16 the negotiating team in connection with that
 17 transaction.
 18 Q. Who else were sort of the key
 19 people on Fairchild's end?
 20 A. Jeffrey Steiner, his son Eric
 21 Steiner, John Flynn, I, our investment banker
 22 Fred Lane and our outside counsel Cahill Gordon.
 23 Q. Fine firm. Who were the primary
 24 members you dealt with on the Alcoa side of the
 25 transaction?

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1 DONALD MILLER - DIRECT
 2 A. Barbara Jeremiah, Cynthia Holloway,
 3 Claire Miller, Peggy Wolff those were the key
 4 people with whom I dealt.
 5 Q. Did Alcoa have a large team that
 6 negotiated this transaction?
 7 A. Had an enormous team.
 8 Q. Sorry, I didn't hear you.
 9 A. They had an enormous team. They
 10 probably had, in connection with the due
 11 diligence or in connection with the acquisition,
 12 the due diligence teams were in the hundreds of
 13 people.
 14 The acquisition team, the lawyers
 15 alone were in the 20s. And probably in the 40s
 16 if you count the ones we couldn't see.
 17 Q. Did you attend, in connection with
 18 your work in this transaction, negotiation
 19 sessions either in person or on the phone
 20 between the parties?
 21 A. Yes. Several.
 22 Q. Several?
 23 A. Yes.
 24 Q. Did that extend over the course of
 25 the negotiation of this transaction?

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1 DONALD MILLER - DIRECT
 2 A. Yes.
 3 Q. Were there negotiation sessions
 4 that you're aware of now that you did not attend
 5 either in person or by phone?
 6 A. Yes.
 7 Q. Were you briefed on those sessions?
 8 A. Yes.
 9 Q. Let's talk a little bit about the
 10 acquisition itself. When did you first learn
 11 about a possible deal between Alcoa and
 12 Fairchild regarding the Fasteners business?
 13 A. We started talking to Alcoa in
 14 2000.
 15 Q. 2000. Did the negotiations kind of
 16 go on and off?
 17 A. They were on and off. Mostly off
 18 until much later, until early 2002 when they
 19 became more serious.
 20 Q. When would you say the basic terms
 21 of the deal started to take shape in?
 22 A. We had pretty much an understanding
 23 in the spring of 2002.
 24 Q. Was that around at the same time
 25 Alcoa did its due diligence efforts?

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1 DONALD MILLER - DIRECT
 2 A. They then at that point began their
 3 subsequent due diligence. They had already done
 4 a considerable amount of due diligence before
 5 then, but they became more serious in the late
 6 spring of '02.
 7 Q. Did that due diligence cover a
 8 number of topics?
 9 A. Covered anything and everything
 10 they could think of.
 11 Q. Did it cover, for example,
 12 environmental matters?
 13 A. Absolutely.
 14 Q. Did it cover matters related to tax
 15 issues?
 16 A. Yes.
 17 Q. Did it cover matters related to
 18 litigation and legal issues?
 19 A. Yes.
 20 Q. How about customer relationships
 21 that the business had with its customers?
 22 A. Yes.
 23 Q. How about financial projections of
 24 the business?
 25 A. Yes.

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1 DONALD MILLER - DIRECT
 2 Q. What about did it also cover things
 3 like condition of the plants?
 4 A. Yes.
 5 Q. And conditions, say, of the
 6 machines in the plants and other equipment in
 7 the plants?
 8 A. Yes. As I told you they had teams
 9 of people going into the plants, reviewing
 10 anything that they could find, everything was
 11 open to them. Those teams were usually in the
 12 20s.
 13 Q. There were a lot of issues we just
 14 went through they did due diligence on. Was
 15 there an indemnity in the agreement that covered
 16 each of those -- every one of those issues, I
 17 should say?
 18 A. There were indemnities in the
 19 agreement. They are pretty clear what they
 20 cover.
 21 Q. But they didn't cover every issue
 22 that Alcoa did due diligence on?
 23 A. No.
 24 Q. For example, the condition of the
 25 plants for example?

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1 DONALD MILLER - DIRECT
 2 A. There is no indemnity for the
 3 condition of the plant, except for environmental
 4 indemnities.
 5 Q. But some were covered by
 6 indemnities; right?
 7 A. Some were and some were not.
 8 Q. You just mentioned the
 9 environmental indemnity. I want to talk about
 10 that for minute. What is your understanding of
 11 the scope of the environmental indemnity that is
 12 in the agreement?
 13 A. It is environmental indemnity. It
 14 covers preexisting environmental conditions.
 15 And off-site environmental conditions. And
 16 covers prior dispositions, companies that we
 17 were not selling to them that had environmental
 18 problems. I knew environmental as air, water
 19 and ground.
 20 Q. I was just going to ask you, what
 21 do you mean when you say environmental
 22 conditions?
 23 A. Air, water and ground.
 24 Q. Why do you think the indemnity is
 25 limited to those items the sort of air water and

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1 DONALD MILLER - DIRECT
 2 ground items?
 3 A. That is my understanding of what
 4 environmental is.
 5 Q. Let's look at the environmental
 6 indemnity section. Tab 1 of your book section
 7 11.6 which is on page, your Honor. Is Bates
 8 marked FC 2808 at the bottom right, page 82 of
 9 tab 1.
 10 THE ARBITRATOR: Section 11.6?
 11 MR. ZUROFSKY: Yes.
 12 Q. Do you have that, Mr. Miller?
 13 A. I do.
 14 Q. What is the title that section?
 15 A. Seller environmental indemnity.
 16 Q. If you look through this section,
 17 we don't need to read every word of it at the
 18 moment, are the terms that are used in this
 19 section terms you understand to be traditionally
 20 associated with issues of air, water and ground?
 21 A. Yes.
 22 Q. For example, if you turn to the
 23 next page where definitions, there is use of the
 24 word contamination. Do you see that there?
 25 A. I am looking at E, Romanette ii

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1 DONALD MILLER - DIRECT
 2 Environmental Contamination.
 3 Q. Yes.
 4 A. Yes. Means "presence, whether
 5 known or unknown of any hazardous materials in
 6 soil, surface water, groundwater, sediments or
 7 other environmental media, including the
 8 movement or migration of said hazardous
 9 materials in such media."
 10 That is pretty typical
 11 environmental.
 12 Q. The term hazardous materials there
 13 is that again your understanding of a term
 14 related to presence of things in the water, air
 15 and ground that kind of thing?
 16 A. Yes.
 17 Q. You see also there is a reference
 18 to next section E 2v -- sorry, just E, Roman v.
 19 The word "Release." Do you see that there?
 20 A. Sorry E Romanette?
 21 Q. Yes. E Roman v. Roman 5?
 22 A. "Release means any releasing,
 23 spilling, seeking, leaking, pumping, pouring
 24 emitting, emptying, discharging, injecting,
 25 escaping, leaching, dumping or disposing of any

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1 DONALD MILLER - DIRECT
 2 hazardous materials into the environment."
 3 Q. Same question. Does that suggest
 4 the covering issues that relate to air, water
 5 and ground?
 6 A. Yes.
 7 Q. How about next definition "Remedial
 8 Action," is that something you heard of --
 9 A. Yes, it talks about, I am not going
 10 to read the whole thing it talks about CERCLA
 11 hazardous materials which we just defined,
 12 typical environmental studying and
 13 investigations, hazardous material, releases.
 14 Q. Same sort of items; right?
 15 A. Yes.
 16 Q. Are you aware, Mr. Miller, I assume
 17 you are aware, are you wear that Alcoa has
 18 contended section 11.6 covers indemnity or
 19 expenses that Alcoa has incurred for example
 20 machine guarding activities, are you aware of
 21 that?
 22 A. I am aware they now claim that.
 23 Q. Do you agree with that?
 24 A. I agree that they claim it. Do I
 25 agree it is covered by this section? No, I

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1 DONALD MILLER - DIRECT
 2 don't believe it is.
 3 Q. Let's talk about some of the things
 4 you were involved with and see how that affects
 5 that conclusion. First I want to talk a little
 6 about the negotiations themselves. You
 7 reference you participated in negotiation
 8 sessions; right?
 9 A. Yes.
 10 Q. Who would you say would be the
 11 prime contacts in those negotiation sessions
 12 with respect to -- let me take a step back.
 13 Did those negotiation sessions
 14 include negotiations about the environmental
 15 indemnity we are talking about here?
 16 A. Yes.
 17 Q. Who did you deal with in connection
 18 with those negotiations?
 19 A. Cynthia Holloway, Claire Miller,
 20 Peggy Wolff.
 21 Q. Alcoa did its, part of its due
 22 diligence, did it do as you understand it Phase
 23 I investigations?
 24 A. Yes.
 25 Q. Did those Phase I investigations

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1 DONALD MILLER - DIRECT
 2 include a look into the environmental conditions
 3 as you use that term?
 4 A. Yes. And other things.
 5 Q. What are the other things as you
 6 understand it those Phase I investigations
 7 looked at that Alcoa did?
 8 A. I understand they looked at things
 9 like machine guarding.
 10 Q. Following that due diligence were
 11 there further negotiations between Alcoa and
 12 Fairchild regarding the terms of the
 13 environmental?
 14 A. Yes.
 15 Q. Did there come a point in time when
 16 Alcoa following that due diligence came back to
 17 you with respect to what they thought should be
 18 covered by this environmental indemnity?
 19 A. There were ongoing discussions
 20 throughout the period.
 21 Q. I want to turn your attention to
 22 tab 2 in your binder.
 23 A. Which is what?
 24 Q. Do you have it there, tab 2.
 25 A. Yes.

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1 DONALD MILLER - DIRECT
 2 Q. These are a series of handwritten
 3 notes.
 4 A. Yes.
 5 Q. Are these, is this your
 6 handwriting?
 7 A. This is my handwriting.
 8 Q. No comments on the penmanship.
 9 What do you understand these notes to be?
 10 A. These are notes of a meeting which
 11 took place June 10, 2002. In which I was
 12 present, Cynthia Holloway, Claire Miller,
 13 Phyllis Brockstein who was their tax lawyer,
 14 Mary Amore, who I think was their Alcoa's
 15 investment banker, Peggy Wolff, Brian Higgins
 16 who was a Skadden lawyer.
 17 Q. This was a meeting following
 18 Alcoa's Phase I visits to the facilities; right?
 19 A. Yes.
 20 Q. So I want to just draw your
 21 attention down, you have the number of items
 22 numbered items here starting at the bottom of
 23 page 1 here.
 24 THE ARBITRATOR: Let me ask, Mr.
 25 Miller, all the names at the top here are

55 (Pages 2329 to 2332)

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1 DONALD MILLER - DIRECT
 2 representatives of Alcoa; is that it?
 3 THE WITNESS: Yes.
 4 THE ARBITRATOR: You were the only
 5 one there from Fairchild?
 6 THE WITNESS: John Flynn was
 7 probably there.
 8 THE ARBITRATOR: Okay.
 9 Q. In fact was Mr. Flynn there as you
 10 understand it, Mr. Miller.
 11 A. Yes. John Flynn was there. We may
 12 have had outside counsel there.
 13 Q. Looking at these numbers, 1, 2, 3
 14 down at the bottom of the page.
 15 A. Yes. This is a list of what they
 16 were saying. They are explaining what they are
 17 saying.
 18 Q. These are notes you're taking
 19 during the meeting?
 20 A. Yes.
 21 Q. It says there "preclosing ours,
 22 post closing theirs." Then sort of go past the
 23 squiggle mark. It says particularly "enviro
 24 liabilities."
 25 A. Correct.

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1 DONALD MILLER - DIRECT
 2 Q. Do you see the word "enviro" there?
 3 A. I do.
 4 Q. Is that your shorthand for
 5 environmental?
 6 A. Those were their words, I am
 7 copying their words, environmental.
 8 Q. You used enviro?
 9 A. I shortened it to enviro.
 10 Q. Do you recall them discussing using
 11 the term EHS in connection with this?
 12 A. No, I would have written it.
 13 Q. Sorry?
 14 A. No, I would have written it.
 15 Q. In fact anywhere have you had a
 16 chance to review your notes from the
 17 negotiation?
 18 A. I have.
 19 Q. Is there any mention or reference
 20 to the term EHS in your notes?
 21 A. No. They never mentioned it. They
 22 talked about environmental which I either wrote
 23 as environmental or shortened to enviro. That
 24 is what we were talking about.
 25 Q. Look at bullet 2.

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1 DONALD MILLER - DIRECT
 2 A. Yes.
 3 Q. It says "They acknowledge that we
 4 had reserves for these enviro liabilities." Do
 5 you see that?
 6 A. I do.
 7 Q. What reserves are being discussed
 8 at this point?
 9 A. Reserves for environmental
 10 liabilities this has to do with what ultimately
 11 became the reserves on the balance sheet and on
 12 the final balance sheet.
 13 Q. Those were reserves carried on
 14 Fairchild Fasteners books?
 15 A. Fairchild's books.
 16 Q. Those related did -- did those
 17 relate to issues affecting ground, air and water
 18 as you defined before?
 19 A. Yes. They are environmental. That
 20 is what they were talking about. Those were the
 21 words they used. That's why you see
 22 environmental.
 23 Q. To your knowledge did you have any
 24 discussion or did the reserve in any way
 25 include --

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1 DONALD MILLER - DIRECT
 2 A. If you see if you look above also,
 3 it is mentioned Chatsworth, enviro liability. I
 4 was copying what they were saying.
 5 Q. That reserve we were just talking
 6 about, did it contain items related to things
 7 like machine guarding in it?
 8 A. Not that I know of, no.
 9 Q. To your understanding the issues
 10 related to air, water and ground?
 11 A. They were environmental.
 12 Q. The next item item 3.
 13 A. Yes.
 14 Q. Phase I assessments?
 15 A. Yes. They want us to take known
 16 environmental liabilities, enviro liabilities.
 17 Q. It says there they want us to take
 18 known enviro liabilities, again you don't recall
 19 them mentioning EHS at that point; do you?
 20 A. They didn't. I would have written
 21 EHS. For one thing is shorter it would have
 22 been easier to write. They weren't talking
 23 about EHS. They were talking about
 24 environmental. That is why I wrote enviro.
 25 Q. Next they want to manage the

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1 DONALD MILLER - DIRECT
 2 remediation; do you see that?
 3 A. Yes.
 4 Q. Is remediation a term you are
 5 familiar with?
 6 A. It is. It is environmental
 7 remediation.
 8 Q. Next item there says "PCE and TCE,"
 9 tell me if I am reading the handwriting
 10 correctly, "use at St. Cosme and Fullerton want
 11 indemnity."
 12 A. Yes.
 13 Q. I want to pause there. Do you
 14 recall Alcoa ever making a request for
 15 indemnification related to those issues during
 16 this meeting?
 17 A. Yes.
 18 Q. How much did Alcoa estimate it
 19 thought those indemnities would amount to?
 20 A. \$20 million.
 21 Q. 20 million you said?
 22 A. \$20 million.
 23 Q. At your deposition do you recall
 24 Mr. Slifkin showed you these notes?
 25 A. Yes.

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1 DONALD MILLER - DIRECT
 2 Q. He asked you about this, do you
 3 recall that?
 4 A. He did.
 5 Q. I believe, we can look at it if you
 6 want, I believe you expressed some confusion
 7 about which meeting might have been which.
 8 A. I didn't have a great deal of time
 9 to prepare for my deposition and I hadn't looked
 10 at everything. I wasn't sure what happened
 11 when. And now I have a better idea.
 12 Q. Since that time have you had a
 13 chance to look at some other documents that
 14 refreshed your recollection about the discussion
 15 at this meeting?
 16 A. Yes. I looked at three documents
 17 in particular. I looked at John Flynn's notes
 18 of the same meeting. I asked John what they
 19 meant. I looked at Cynthia Holloway's notes. I
 20 looked at my own notes. And I also looked at
 21 the proxy.
 22 Q. The Proxy Statement that was issued
 23 by Fairchild?
 24 A. By Fairchild.
 25 Q. Does that Proxy Statement contain

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1 DONALD MILLER - DIRECT
 2 any sort of chronology of events?
 3 A. It does. It is called the history
 4 of the transaction.
 5 Q. That helped refresh your
 6 recollection about this?
 7 A. Sure did.
 8 Q. You mentioned you looked at some of
 9 Ms. Holloway's notes. I want to briefly turn
 10 your attention to tab 4 of your book.
 11 A. Yes. She has beautiful penmanship.
 12 Q. She really does. You look at this
 13 dated June 10, 2002.
 14 A. Yes.
 15 Q. Do you understand this to be
 16 Ms. Holloway's notes from that same meeting?
 17 A. Yes.
 18 Q. Focus right on that page there in
 19 the middle, there is that sort of squared box.
 20 A. Yes.
 21 Q. She had the term EHS there, do you
 22 see that?
 23 A. Next to "litigation/EHS."
 24 Q. Do you see that?
 25 A. I am looking in the square box.

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1 DONALD MILLER - DIRECT
 2 Q. To the left of the square box, the
 3 first item listed is debt on the top not in the
 4 square box, now at the top of the notes?
 5 A. "Debt, worker's comp, OPEB.
 6 Product warranty." I see "EHS. Unknown" I
 7 believe it says "EHS."
 8 Q. Litigation and EHS?
 9 A. Litigation and EHS.
 10 Q. She has that written there. Again
 11 do you recall her using that term during that
 12 meeting?
 13 A. She didn't. If she used it I would
 14 have written it.
 15 Q. Let's look at the substance of what
 16 is in here. What are the matters in that box
 17 we're talking about, what are the subject
 18 matters as best you can tell she has from the
 19 notes?
 20 A. These are environmental liabilities
 21 she is talking about at various plants. She is
 22 talking primarily about PCE and TCE which was
 23 Fullerton and St. Cosme.
 24 Q. You see there TCE, looking halfway
 25 down the box, "can use but can't throw in

57 (Pages 2337 to 2340)

Page 2341

1 DONALD MILLER - DIRECT
 2 groundwater." Do you see that?
 3 A. Yes.
 4 Q. Next line says "indemnity covers
 5 known and unknown but time limit is open." Do
 6 you see that?
 7 A. Yes.
 8 Q. Next line says "won't dig holes to
 9 find this unless we find this. Anything we
 10 discover in ordinary course." Do you see that?
 11 A. Yes.
 12 Q. Does this refresh your recollection
 13 that these are the topics discussed during that
 14 meeting when the indemnity was being addressed?
 15 A. Yes.
 16 Q. Look to the left of that box, it
 17 says there "PCE and TCE."
 18 A. Yes.
 19 Q. What is the number below it?
 20 A. "\$20 million NPV." Which I believe
 21 means net present value.
 22 Q. Are these notes that helped refresh
 23 your recollection reflecting on your notes from
 24 that same meeting?
 25 A. Yes.

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1 DONALD MILLER - DIRECT
 2 Q. Turn if you can in your book one
 3 tab earlier to tab 3 -- before we do that. Did
 4 Mr. Slifkin show you these notes during your
 5 deposition, Ms. Holloway's notes? If you want to
 6 look we can look. But do you recall him showing
 7 you?
 8 A. I don't recall whether he showed
 9 me. No. I don't think he did.
 10 Q. Look at tab 3.
 11 A. Yes. No, he didn't.
 12 Q. Tab 3. Is this another document
 13 you reviewed?
 14 A. Yes.
 15 Q. Since your deposition?
 16 A. Yes.
 17 Q. It is an email, the top is an email
 18 from Ms. Holloway looks like to herself on what
 19 appears to be June 9, the day before the.
 20 That meeting; is that right?
 21 A. Yes.
 22 Q. I want to draw your attention to
 23 page 4 at bottom there which is Bates FAIR
 24 50025537. Do you see that?
 25 A. Yes.

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1 DONALD MILLER - DIRECT
 2 Q. If you look at the first entry
 3 bottom of the page there is a number 6 it says
 4 EHS. Do you see that?
 5 A. Yes.
 6 Q. It reads there "Most probable
 7 estimated for cleanup non TCE is 4 million for
 8 first two years and 2.5 million per year for 15
 9 years for TCE and other related clean-up
 10 efforts. Total NPV at 12 percent is 20
 11 million."
 12 Do you see that, Mr. Miller?
 13 A. I do.
 14 Q. Is that your recollection, does
 15 that refresh your recollection as to what was
 16 being discussed in terms of the indemnity at the
 17 June 10 meeting?
 18 A. Yes.
 19 Q. Does that relate to, going back to
 20 your notes at tab 2, we were looking at the
 21 second page item 4 on your notes?
 22 A. Yes.
 23 Q. Do you believe you are talking
 24 about that issue in item 4 of your notes?
 25 A. Yes.

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1 DONALD MILLER - DIRECT
 2 Q. Going back to Ms. Holloway's email,
 3 tab 3?
 4 A. Yes.
 5 Q. The next bullet sort of after what
 6 I just read to you.
 7 A. This is a completely separate
 8 issue.
 9 Q. Let's read it "Most California
 10 sites relatively clean operationally but we will
 11 need additional expenditures..." yes?
 12 A. "For guarding of machines and
 13 general EHS clean-up for California and European
 14 operations note almost all of the cost
 15 anticipated for the cleanup was included in the
 16 valuation analysis."
 17 Q. Do you recall Ms. Holloway or
 18 anyone from Alcoa raising that issue in
 19 connection with the indemnity discussion that
 20 happened the next day on June 10?
 21 A. No. It was unrelated.
 22 Q. Sorry, what?
 23 A. It was unrelated. This is a
 24 separate issue.
 25 Q. Back to your notes from June 10

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1 DONALD MILLER - DIRECT
 2 which is at tab 2. Before we do, should I ask
 3 did Mr. Slifkin --
 4 A. Not in connection with
 5 environmental. It was not discussed.
 6 Q. Did Mr. Slifkin show you the email
 7 we just read during your deposition?
 8 A. No.
 9 Q. Back to tab 2. Second page. After
 10 the fourth sort of numbered entry there there is
 11 another entry. Okay.
 12 A. Yes.
 13 Q. What does that entry mean?
 14 A. It says "Compliance issues. They
 15 will give us a list 20 to \$40 million."
 16 Q. Is that something that the Alcoa
 17 folks raised during that meeting?
 18 A. Exactly in this form, yes.
 19 Q. Do you have any recollection of
 20 them asking for those compliance issues to be
 21 covered by the environmental indemnity?
 22 A. No.
 23 Q. Did they ever give you a list of
 24 what those items might be?
 25 A. We asked for a list. And they said

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1 DONALD MILLER - DIRECT
 2 they would give it to us. But we never received
 3 it. I assume looking back and comparing it to
 4 Cynthia Holloway's notes that this is the
 5 guarding of machines, generally EHS clean-up,
 6 but which she had already factored into her
 7 valuation analysis. That's probably why we
 8 never heard back from them again.
 9 Q. The next question I want to ask
 10 you, you were not at every, as I think you
 11 testified earlier, every negotiation session;
 12 right?
 13 A. Correct. I was at most.
 14 Q. What is that?
 15 A. I was at most.
 16 Q. You were at most. Is it possible
 17 that Mr. Jeffrey Steiner attended negotiation
 18 sessions you were not at?
 19 A. There was probably one.
 20 Q. One. Do you believe that Mr.
 21 Steiner would have, if he did brief you about
 22 that negotiation session?
 23 A. Absolutely.
 24 Q. Do you believe that Mr. Steiner
 25 would have agreed to include in an indemnity

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1 DONALD MILLER - DIRECT
 2 additional compliance issues of 20 to 40 million
 3 and not tell you about it?
 4 A. No. That certainly would not have
 5 ever happened.
 6 Q. Do you believe Mr. Steiner would
 7 have agreed to cover EHS items using that term
 8 that turned out millions and millions of
 9 dollars?
 10 A. No. I don't think he even knows
 11 what it means.
 12 Q. What what means?
 13 A. EHS.
 14 Q. Did you know what it meant?
 15 A. He certainly never used it in
 16 discussion with me. I can't imagine -- no, I
 17 didn't know what it meant either.
 18 Q. Was that a term that Fairchild
 19 corporate offices used?
 20 A. Never.
 21 Q. We heard some testimony, you were
 22 here a little earlier about a gentleman called
 23 Tony Miramadi.
 24 A. Yes.
 25 Q. Who was Tony Miramadi?

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1 DONALD MILLER - DIRECT
 2 A. He was a plant -- he worked in the
 3 plant at Fairchild Fasteners. And he was in
 4 charge of environmental matters.
 5 Q. Do you remember you might have seen
 6 the document put up during Mr. Hodge's testimony
 7 in which Mr. Miramadi wrote that he was EHS
 8 director. Do you recall that?
 9 A. I did see that.
 10 Q. Was that his job title according to
 11 Fairchild Corporation?
 12 A. Not that I know of.
 13 Q. What was his job title according to
 14 Fairchild Corporation log?
 15 A. In our directories he was referred
 16 to as environmental safety director.
 17 Environmental safety director, no comma, no
 18 nothing. Environmental safety director. And I
 19 wonder when that chart was published, when he
 20 wrote it. Because I would guess that it was
 21 much later. By that time certainly the word had
 22 gone all through the plants that Alcoa was going
 23 to buy the business. Likely he and other
 24 employees had researched what position they
 25 hoped to get at Alcoa and what Alcoa called such

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1 DONALD MILLER - DIRECT
2 positions that they wanted. And named it. We
3 wouldn't have been involved in it. We wouldn't
4 have stopped him. We wouldn't have even known
5 about it for that matter.

6 Q. Just so I'm clear, Mr. Miramadi's
7 title in the Fairchild directory was not EHS
8 director?

9 A. No.

10 Q. That is something -- did you have a
11 lot of interaction with Mr. Miramadi?

12 A. I may have met him once, I may
13 never have met him. I may have talked to him on
14 the telephone over the years I was with
15 Fairchild one or two times. And that was it. I
16 had almost no interaction with him.

17 Q. But you checked on his title in the
18 directory for purposes of this arbitration?

19 A. I did.

20 Q. Do you know if Mr. Miramadi got a
21 job with Alcoa following the acquisition?

22 A. Yes, he did.

23 Q. Do you know what that job was, do
24 you have any recollection?

25 A. I think it was probably

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1 DONALD MILLER - DIRECT

2 Q. What else?

3 A. The second is there would have been
4 a cost associated with updating those items.
5 And that cost would have been a significant
6 cost. And we had already told Alcoa that we
7 would not bear that extent of a cost.

8 Q. Are you aware that Alcoa in this
9 arbitration indicated that machine guarding
10 alone might cost \$15 million on what it wants to
11 do?

12 A. I am. We certainly wouldn't have
13 accepted that.

14 Q. Let's talk about that for minute.
15 You said there was associated cost. How would
16 there be a cost associated?

17 A. With machine guarding?

18 Q. Yes, if Fairchild agreed to
19 indemnify them for machine guarding.

20 A. Because those machines were in use
21 and in flux and some apparently didn't have
22 machine guarding. Although they may have at one
23 time. It would have cost money to fix them, put
24 them back on.

25 Q. In your view if Fairchild had

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1 DONALD MILLER - DIRECT
2 environmental, health and safety, but I don't
3 know.

4 Q. Do you understand that Alcoa lumped
5 those functions together as a corporate entity?

6 A. Correct.

7 Q. Let's switch, we talked a little
8 bit about the negotiations that you recall and
9 your recollection of what was discussed. Do you
10 believe Fairchild would have agreed to an
11 indemnity that would have covered things like
12 machine guarding had it been raised?

13 A. No.

14 Q. Why do you say that?

15 A. Well there were specific
16 discussions over what we would warrant and what
17 we wouldn't. What we would represent and what
18 we wouldn't.

19 One of the things that specifically
20 was a subject of discussion was the condition of
21 machines. And we would not agree to represent
22 that our machines were in any particular
23 condition. Machine guarding has to do with
24 those machines.

25 So that's one reason.

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1 DONALD MILLER - DIRECT

2 agreed to that indemnity would that have an
3 effect on the purchase price of the acquisition?

4 A. In effect it would have dropped the
5 purchase price by the amount of what it cost to
6 repair those machines.

7 Q. That money would have come out of
8 Fairchild's pocket?

9 A. Correct. By the way, they didn't
10 even want us to fix them.

11 Q. They didn't want you to fix the
12 machines?

13 A. No.

14 Q. How do you say that?

15 A. Well, first of all there is a huge
16 number of representations, there are pages of
17 representations in the agreement. Into place
18 had they asked us to represent the condition of
19 the machinery. Because it wasn't part of the
20 deal.

21 Secondly, if you look in what we
22 were allowed to do and what we were not allowed
23 to do between signing and closing, we were not
24 allowed to expend capex, capital expenditures of
25 more than \$500,000. If they are saying it is

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1 DONALD MILLER - DIRECT
 2 \$15 million, we could hardly have made a debt in
 3 machine guarding. But it wasn't. It was never
 4 part of the deal.
 5 Q. Let's talk about, I want to follow
 6 up on the question I asked just minute ago about
 7 reduction in the purchase price. Let's talk a
 8 little bit about that issue.
 9 Back to sort of the June 10, June
 10 11 time frame.
 11 A. Yes.
 12 Q. In connection with that there was
 13 also a meeting on June 11, you understand that
 14 to be the case?
 15 A. Yes.
 16 Q. In connection with those meetings
 17 did Alcoa ask for a reduction in the purchase
 18 price of the deal?
 19 A. They did. They had promised that
 20 they wouldn't do that. That they were doing
 21 their due diligence. At the end of their due
 22 diligence they would either buy or not. They
 23 came back and said, gee, we have found \$75
 24 million of problems, we want that reduced off
 25 the purchase price.

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1 DONALD MILLER - DIRECT
 2 THE ARBITRATOR: When was this
 3 discussion?
 4 THE WITNESS: They prefaced it by
 5 telling the professionals on June 10 that was
 6 the reduction they were going to be looking for.
 7 We then had a meeting with the
 8 senior, two senior people, Jeffrey Steiner and
 9 Barbara Jeremiah on the 11th in which they
 10 presented their demands for reduction in the
 11 purchase price of \$75 million. Which later
 12 became in the meeting -- sorry.
 13 Q. Finish the question.
 14 A. Which later in the meeting became
 15 66.
 16 Q. What was Fairchild's reaction to
 17 Alcoa's demand of that kind of purchase price
 18 reduction?
 19 A. Jeffrey Steiner our Chairman was
 20 very disturbed. He said there was no way that I
 21 would ever agree to a 50 or \$100 million
 22 reduction in the purchase price. You're wasting
 23 your time. I won't agree to it. It is my
 24 recollection that when Barbara Jeremiah insisted
 25 that that was the scope, he said thank you and

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1 DONALD MILLER - DIRECT
 2 he got up and he left.
 3 Q. If you turn to tab 5 of your
 4 binder.
 5 A. Yes.
 6 Q. Looks like that same nice
 7 penmanship.
 8 A. I know it is easy to see.
 9 Q. See there it says 6/11/02?
 10 A. Yes.
 11 Q. I want to turn your attention to
 12 the page which at the lower right-hand corner is
 13 fair 50025597. Do you see that?
 14 A. Yes.
 15 Q. Do you see there, I guess there is
 16 a comment, second comment down says Jeffrey?
 17 A. "Jeffrey won't give us a 50 or 100
 18 million reduction not one chance in a million
 19 will he," parentheses he, "agree."
 20 Q. Is that what you were just
 21 referring to that discussion?
 22 A. Absolutely. He left.
 23 Q. Was the fact that -- did
 24 negotiations break off at that point?
 25 A. Yes.

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1 DONALD MILLER - DIRECT
 2 Q. Was that fact communicated --
 3 A. Well, when you say at that point,
 4 negotiations between him and Barbara Jeremiah
 5 broke off at that moment. When he left she
 6 left. Some of the professionals stayed on and
 7 looked at each other for a while, tried to think
 8 if there was some way to bridge this. Then we
 9 all parted within ten minutes after that.
 10 Q. Was it in your mind the deal was
 11 pretty much off at that point?
 12 A. The deal was off at that point if
 13 that was what Alcoa was going to insist upon.
 14 Q. Is that fact reflected in the Proxy
 15 Statement you reviewed?
 16 A. Yes.
 17 Q. So we are talking here about not
 18 one chance in a million between 50 and 100
 19 million reduction. Let's talk a little bit
 20 about the math here, okay, Mr. Miller?
 21 A. Yes.
 22 Q. So on June 10 Alcoa came to you as
 23 we saw in your notes and asked for 20 million in
 24 indemnity; correct?
 25 A. Correct.

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1 DONALD MILLER - DIRECT
 2 Q. That was to cover environmental
 3 items as you understood it?
 4 A. Yes.
 5 Q. Same items covered by the reserve?
 6 A. Same items that were covered by the
 7 reserve.
 8 Q. How much was the reserve?
 9 A. 8.45, I believe.
 10 Q. Was there a difference of opinion
 11 between the parties as to how much those
 12 liabilities were going to cost?
 13 A. We carried those liabilities at
 14 8.45 because in good faith we believed that's
 15 what it would cost.
 16 Q. Did you expect when -- let me --
 17 A. We certainly didn't expect them to
 18 cost \$40 million, no.
 19 Q. Did Fairchild, however, eventually
 20 agree in the Acquisition Agreement to indemnify
 21 Alcoa for the PCE, TCE type clean ups that we're
 22 talking about?
 23 A. Yes. I believe that was always the
 24 understanding. That we were responsible for
 25 this.

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1 DONALD MILLER - DIRECT
 2 Q. Did you believe it was going to be
 3 20 million in exposure?
 4 A. No.
 5 Q. It was just a matter of figuring
 6 out how it plays out in the future and how much
 7 it would cost?
 8 A. Correct.
 9 Q. Let's put that to the side at this
 10 meeting. They also asked for, I think you
 11 testified 75 million in purchase price
 12 reduction?
 13 A. Initially which became 66 I
 14 believe.
 15 Q. Did the parties eventually agree on
 16 purchase price reduction?
 17 A. Yes.
 18 Q. How much?
 19 A. Really they split the 66. About
 20 33.
 21 Q. Do you recall in your notes at June
 22 10 Alcoa also raised an issue about 20 to 40
 23 million for compliance issues, do you recall
 24 that?
 25 A. Yes.

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1 DONALD MILLER - DIRECT
 2 Q. I think you testified they never
 3 gave you the list of those issues; correct?
 4 A. They never gave us a list of the
 5 issues.
 6 Q. If compliance issues were included
 7 in the indemnity, did you tell me earlier you
 8 believe that would be the effect of having a
 9 purchase price discounts?
 10 A. Absolutely.
 11 Q. What would be the total purchase
 12 price, net purchase price discounts if you
 13 included those compliance issues and the 33
 14 million that eventually was agreed to?
 15 A. It would put it way in excess of
 16 the 50 that Jeffrey walked out over. It would
 17 be essentially \$75 million right there.
 18 Q. Which Mr. Steiner walked out on?
 19 A. He walked out. He wouldn't accept.
 20 None of us would have accepted it. It was just
 21 out of the question.
 22 Q. The deal was off at that point?
 23 A. The deal would have been off.
 24 Q. That is a fact disclosed in the
 25 Proxy Statement?

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1 DONALD MILLER - DIRECT
 2 A. That is a lot of money. That is
 3 over 10 percent of the entire purchase price.
 4 Q. Is that a reason why you feel the
 5 machine guarding issues were not included in the
 6 indemnity?
 7 A. They never were. That was an issue
 8 which they threw out. They were trying to come
 9 up with, I think, I can only tell you what I
 10 think, they were trying to come up with the
 11 highest number they could then bargain down.
 12 Hold these things over our heads.
 13 Q. In light of that --
 14 A. I don't think they were ever
 15 serious about that but I don't know.
 16 Q. In light of that, Mr. Miller, in
 17 light of your experience in the negotiations, is
 18 there any chance in your mind Fairchild would
 19 have agreed to indemnify Alcoa on top of the
 20 PCE, TCE cleanup for tens of millions of dollars
 21 in things like machine guarding expenses?
 22 A. No. For that matter it would have
 23 been covered entirely differently had we.
 24 Q. Why do you say that?
 25 A. Because it would have had to do,

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1 DONALD MILLER - DIRECT
 2 been put into a representation as to the
 3 condition of the machinery. It had nothing to
 4 do with environmental. It had to do with
 5 something separate.
 6 Q. Let's talk about that for minute.
 7 Environmental at the time of this agreement were
 8 unknown in terms of what their scope was going
 9 to be in the future; right?
 10 A. Unknown in terms of how extensive
 11 they were or what they were. But we all knew
 12 they were air, water and ground.
 13 Q. Alcoa, did Alcoa request to do
 14 Phase II investigations in connection with its
 15 due diligence?
 16 A. Yes, they did.
 17 Q. What did you understand was going
 18 to be the scope of those Phase II investigations
 19 in terms of subject matter?
 20 A. They were going to have to do with
 21 air, ground and water. They were not going to
 22 have to do with, quote, machine guarding or
 23 things of that nature.
 24 Q. Alcoa did not ask for any more due
 25 diligence about machine guarding and those types

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1 DONALD MILLER - DIRECT
 2 of issues in connection with this transaction?
 3 A. No. It is the kind of thing you
 4 could walk into the plant, look at the machines,
 5 count the machines and see instantly whether or
 6 not they had machine guards.
 7 Q. In your experience negotiating
 8 transactions and this transaction, are those
 9 types of items things that are subject usually
 10 to indemnities when there are known items?
 11 A. Please repeat the question.
 12 Q. In your experience negotiating
 13 acquisition transactions and including your
 14 experience in this transaction are those types
 15 of items items where you say you can walk into
 16 the plants and see what is going on, are those
 17 usually covered by indemnities or are they
 18 sometimes covered otherwise?
 19 A. They are covered usually by
 20 representations and warranties which are backed
 21 up by indemnities. They are not covered by
 22 indemnities alone.
 23 Q. Is there a representation and
 24 warranty with respect to machine guarding --
 25 A. Absolutely not. --

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1 DONALD MILLER - DIRECT
 2 Q. Let me finish my question -- with
 3 respect to the state of the machine guarding at
 4 the facilities?
 5 A. No. Absolutely not. We weren't
 6 warranting the condition of the machinery. Some
 7 of it was old and some of it was new.
 8 Q. Let's talk about what you were
 9 representing, if you look at the Acquisition
 10 Agreement.
 11 A. Yes.
 12 Q. Section 3.24, please.
 13 Your Honor, that is on page 39 of
 14 tab 1 of Mr. Miller's binder.
 15 A. Yes.
 16 Q. You see 3.24?
 17 A. Yes.
 18 Q. First line says -- title of that
 19 section is what?
 20 A. Environmental Matters.
 21 Q. It says there "Except as set forth
 22 on Schedule 3.24."
 23 A. Yes.
 24 Q. Subsection A, is that a
 25 representation and warranty by Fairchild?

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1 DONALD MILLER - DIRECT
 2 A. Yes it is.
 3 Q. What is the representation and
 4 warranty being made there?
 5 A. "Fairchild has obtained all
 6 licenses, permits, authorizations approvals and
 7 consent of governmental entities, which are
 8 required under applicable environmental law and
 9 necessary for it to conduct its business, as it
 10 is now carried out. "That is the essence of it.
 11 Q. Let me paraphrase and see if you
 12 agree is the essence regarding compliance with
 13 Environmental Laws as a defined term?
 14 A. Yes.
 15 Q. If something was, if there was in
 16 the aggregate looking at the bottom of the page,
 17 if the aggregate of material problem --
 18 A. Actually, I don't think what you
 19 said is not correct. This is not -- this is a
 20 representation we have obtained the licenses and
 21 permits to operate everything.
 22 Q. If you look down a couple, perhaps
 23 I shouldn't have cut you off from reading. If
 24 you look down near the bottom of that section, I
 25 guess four or five lines up from the top, it

63 (Pages 2361 to 2364)

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1 DONALD MILLER - DIRECT
 2 says the words "and with all applicable
 3 Environmental Laws." Do you see that?
 4 A. Yes.
 5 Q. Maybe it makes sense I will read
 6 the sentence you tell me if we should resist it
 7 the each. "Each of such environmental permits
 8 is in full force and effect and each of the
 9 sellers and transferred Fasteners subsidiaries
 10 is in compliance with the terms and conditions
 11 of each such environmental permits and with all
 12 applicable Environmental Laws. "
 13 A. Yes.
 14 Q. Is that a representation --
 15 A. Yes. You were right the first
 16 time.
 17 Q. That is why we read it. That is
 18 the representation by Fairchild that --
 19 A. Uh-huh.
 20 Q. Would you expect then given this
 21 representation and warranty if there was an
 22 exception to that representation it would be
 23 listed on Schedule 3.24?
 24 A. Yes.
 25 Q. Let's look at Schedule 3.24. I am

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1 DONALD MILLER - DIRECT
 2 going to look at, first one I want you to look
 3 at is on tab 7 of your binder. Do you see it
 4 there, Mr. Miller?
 5 A. Yes.
 6 Q. It says Schedule 3.24 entitled
 7 Environmental Matters?
 8 A. Yes.
 9 Q. Is there any mention in this about
 10 machine guarding non-compliance for example?
 11 A. No.
 12 Q. What are the subject matters that
 13 are addressed in this schedule?
 14 A. Environmental matters.
 15 Q. By that you mean?
 16 A. I mean air, water, ground.
 17 Q. Are these the same items generally
 18 speaking that are also contained in the reserve?
 19 A. Yes.
 20 Q. Generally speaking.
 21 A. Generally speaking, yes.
 22 Q. Okay.
 23 A. Except for litigation matters.
 24 Q. Was this schedule, if you know,
 25 attached to the signed agreement in July?

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1 DONALD MILLER - DIRECT
 2 A. Yes, it was.
 3 Q. If you turn to the next tab you see
 4 it again says Schedule 3.24 environmental
 5 matters but the top says Revised Disclosure
 6 Schedule dated 12/3/02?
 7 A. Yes, Fairchild was required to
 8 update its schedules.
 9 THE ARBITRATOR: Which tab are you
 10 on?
 11 MR. ZUROFSKY: Tab 8. We did tab
 12 7 was the July 1, we are looking now at the
 13 revised one.
 14 Q. Sorry, Mr. Miller?
 15 A. Between the time of the signing of
 16 the agreement and the closing Fairchild was
 17 required to update its schedules for any new
 18 matters and Alcoa had the right to disallow
 19 changes to the schedules and had various
 20 remedies if there were changes to the schedules
 21 this is a schedule that was the final schedule,
 22 revised disclosure schedule that was delivered
 23 at the closing 12/3/02 and accepted by Alcoa.
 24 Q. You are referring to Claimant's
 25 Exhibit 307 at tab 8?

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1 DONALD MILLER - DIRECT
 2 A. Yes.
 3 Q. Any mention in that document of
 4 issues like machine guarding?
 5 A. No, it wouldn't belong there.
 6 Q. At this time is it your
 7 understanding Alcoa already had estimates of
 8 millions of dollars of expenditures on machine
 9 guarding issues?
 10 A. Yes.
 11 Q. Coming back to the agreement at tab
 12 1. I want to turn your section B of 3.24.
 13 A. If you notice there is a subsection
 14 of this called Environmental Claims.
 15 Q. Yes.
 16 A. Nothing in there about machine
 17 guarding.
 18 Q. Let's look. You are talking about
 19 tab 8 now?
 20 A. 7 and 8.
 21 Q. I want to address Environmental
 22 Claims back in the agreement which is subsection
 23 3.24 B at tab 1. Do you see it is another
 24 representation by Fairchild is that right, Mr.
 25 Miller?

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DONALD MILLER - DIRECT

A. Yes, it is.

Q. Again the opening to the section is "except as set forth on Schedule 3.24." Then in subsection B there are no Environmental Claims; right?

A. Correct.

Q. An Environmental Claim is defined in section G there, subsection G.

A. Yes.

Q. Do you understand it to mean Environmental Claim means claim made pursuant to defined term Environmental Law?

A. Yes. You see they talk about cleanup costs, response costs, natural resources damages, property damages, personal injuries pursuant to Environmental Law. That is very typical environmental language.

Q. Again, if there was a claim, quote/unquote Environmental Claims in defined terms that had been made pursuant to Environmental Law again it would be something you would expect to be disclosed on section 3.24?

A. Yes. Absolutely.

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DONALD MILLER - DIRECT

Q. In terms of machine guarding were there however claims made against Fairchild at the time of the acquisition regarding machine guarding issues?

A. Yes.

Q. Which schedule did they appear on, Mr. Miller?

A. The Litigation Schedule 3.24.

Q. You mean 3.24. Look at tab 9. I think you might have said the wrong section?

A. Sorry. 3.16.

Q. That is tab 9; right?

A. Yes. Tab 9, 3.16.

Q. Is that the general litigation matter schedule?

A. Yes.

THE ARBITRATOR: Which tab is that?

MR. ZUROFSKY: Sorry, tab 9 your Honor.

Q. There are, are there not, machine guarding claims listed on this schedule; right, Mr. Miller?

A. Yes. I know they are. I am

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DONALD MILLER - DIRECT

looking for it.

Q. I will draw your attention to it.

A. Yes.

Q. If you want to flip through, page 192 of the document, I believe -- actually that may not be right.

A. That's not right.

Q. Sorry, 193 of the document which is Bates FC 233. Do you see the title there OSHA?

A. OSHA investigation cases.

Q. Those are related to machine guarding at least some of them as you understand it?

A. Yes. Look at number 2 "Rebecca Grechman lost her index finger."

Q. That appears on Schedule 3.16 general litigation; right?

A. Uh-huh. I know some of these are machine guarding.

Q. Turn back to tab 1 in your binder, the Acquisition Agreement. Sorry. Are you finish with your answer?

A. Look at number 1, Sylvia Lenart we were fined \$18,000 for inadequate machine

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DONALD MILLER - DIRECT

guarding. That is where those cases belong.

Q. At this time, however, did you understand Alcoa had estimates for millions of dollars in machine guarding expenses that they were planning on spending?

A. When you said at this time you mean at the time the schedules were delivered?

Q. The time of the acquisition.

A. Absolutely.

Q. Back to tab 1 we were on section 3.24. We were, I believe on page 40 of the agreement. Again there are a series of representations here, Mr. Miller.

A. Yes.

Q. Do any of them relate to, as you understand it, things like machine guarding?

A. No.

Q. Turn to the definition of --

A. Had there been a machine guarding representation it would have been very clear, it would have said all machines are in good and safe operating condition except as set forth in Schedule 3.24 X. No such schedule.

Q. Was it your understanding machines

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1 DONALD MILLER - DIRECT
 2 were sold on an as is basis?
 3 A. Of course.
 4 Q. Like other equipment in the plants?
 5 A. Like other equipment in the plants.
 6 Q. Turn to the definition of
 7 Environmental Law now in subsection G.
 8 A. Yes.
 9 Q. You're familiar with this?
 10 A. I am.
 11 Q. What do you understand the term
 12 Environmental Law to cover?
 13 A. It covers environmental laws
 14 pertaining to air, ground and water.
 15 Q. When you say air, ground, water, I
 16 want you to draw attention to subsection B.
 17 A. Yes.
 18 THE ARBITRATOR: What page are you
 19 on?
 20 MR. ZUROFSKY: Sorry, your Honor,
 21 page 41 of tab 1.
 22 A. 3.24 G Romanette ii.
 23 Q. There is a definition of
 24 Environmental Law it says any law related to,
 25 there is three subparts, do you see that, Mr.

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1 DONALD MILLER - DIRECT
 2 Miller?
 3 A. I do.
 4 Q. First one is pollution or
 5 protection of the environment; right?
 6 A. Yes.
 7 Q. Second one says "workplace health
 8 or safety" do you see that?
 9 A. I do.
 10 Q. What do you understand that to be
 11 covering?
 12 A. This is a definition of
 13 Environmental Law in an environmental matters
 14 section. This has to do with dangerous
 15 conditions which could hurt or workers.
 16 Dangerous environmental conditions which could
 17 hurt our workers. Heavy metals, percolation of
 18 vapors through the subslabs of the building.
 19 Things like that.
 20 Q. Mr. Miller, I understand you are
 21 not an environmental expert, but do you
 22 understand there are laws in fact that have
 23 specific application to the workplace that deal
 24 with those kind of issues like vapors and
 25 whatnot?

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1 DONALD MILLER - DIRECT
 2 A. Yes.
 3 Q. I notice here it doesn't say under
 4 B, workplace health or safety it doesn't say
 5 related to environmental matters. It doesn't
 6 have those words in B. Does that change your
 7 view?
 8 A. No. I know what this meant. This
 9 is an environmental matters section. It has to
 10 do with environmental laws. That was what the
 11 deal was. This had to do with the environment.
 12 Q. Again, Mr. Miller, at any point in
 13 any discussions, negotiations you had, was there
 14 any moments or time when Alcoa asked Fairchild
 15 to indemnify them for machine guarding expenses
 16 and the like?
 17 A. No. That is what -- look, this is
 18 very frustrating to me. I was there. I was
 19 there through the negotiations. To say these
 20 little words tucked in the middle of an
 21 Environmental Law section, these two words which
 22 is a subsection to environmental matters
 23 section, has to do with machine guarding when
 24 they could have said in 93 other places that we
 25 were responsible for machine guarding and the

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1 DONALD MILLER - CROSS
 2 condition of machinery is just very frustrating
 3 to me. I will say no more.
 4 Q. I'm done on that, Mr. Miller.
 5 Thank you very much.
 6 THE ARBITRATOR: Do you have any
 7 questions, counsel?
 8 MR. ZUROFSKY: I am assuming he
 9 says yes.
 10 MR. CHESLER: A few your Honor.
 11 CROSS-EXAMINATION BY MR. CHESLER:
 12 Q. Good afternoon, Mr. Miller.
 13 A. Hello, Evan. How are you?
 14 Q. It is your testimony you were
 15 involved in the negotiation of the scope of the
 16 definition of Environmental Law; is that
 17 correct?
 18 A. Yes.
 19 Q. And in fact you recall that there
 20 were several drafts of this agreement that went
 21 back and forth between the law firms
 22 representing the parties; correct?
 23 A. Yes.
 24 Q. And your company was represented by
 25 the Cahill firm and Alcoa was represented by the

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1 DONALD MILLER - CROSS
 2 Skadden firm; correct?
 3 A. Yes.
 4 Q. You testified at your deposition
 5 that the definition of Environmental Law, which
 6 you just talked about on direct-examination was
 7 the subject of bargaining. Do you recall that?
 8 A. Yes.
 9 Q. I want you to go back to the
 10 agreement again if you would. I think you have
 11 it in front of you.
 12 A. I do.
 13 Q. Let me use the copy, there are so
 14 many of these floating around I may have a
 15 different copy in my book. I don't want to get
 16 you confused or me confused on the pages.
 17 A. Give me a section number I won't
 18 get confused.
 19 Q. Excuse me?
 20 A. If you give me a section number, it
 21 will be less confusing for me.
 22 Q. All right. I will try to do that
 23 let's first look at 11.6A
 24 A. Yes.
 25 Q. That is the basic indemnification

Page 2378

1 DONALD MILLER - CROSS
 2 section isn't it?
 3 A. Yes, it is.
 4 Q. If you look at 11.6A I take it you
 5 would agree with me the defined term for which
 6 my client was indemnified is Fastener
 7 Environmental Liabilities, three capital
 8 letters; correct? It is about halfway through
 9 the paragraph on page 2808.
 10 A. Yes.
 11 Q. Yes?
 12 A. Yes.
 13 Q. You know from your vast experience
 14 when a term is capitalized in a contract, that
 15 typically means it is a term of art that has a
 16 specific definition; right?
 17 A. Yes.
 18 Q. Would you turn with me then to
 19 11.6E, little iv. Which appears on page 2810,
 20 Bates stamp page. You have that?
 21 A. I do.
 22 Q. That is the definition of Fastener
 23 Environmental Liabilities which is what it is we
 24 are indemnified for; correct?
 25 A. It is a definition of Fastener

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1 DONALD MILLER - CROSS
 2 Environmental Liabilities.
 3 Q. If you go down in the text eight or
 4 ten lines talking about what Fastener
 5 Environmental Liabilities means, it says "all
 6 losses, damages" and this long list of words
 7 there. You go down about four or five lines it
 8 says "Based on any applicable Environmental Laws
 9 existing on the closing date in respect of any
 10 Fastener Environmental Condition. "Correct?"
 11 A. Yes.
 12 THE ARBITRATOR: You are looking
 13 at Roman numeral?
 14 MR. CHESLER: iv, your Honor.
 15 Beginning six lines into that paragraph, the
 16 definition of Fastener Environmental Liabilities
 17 refers to "any applicable Environmental Laws
 18 existing on the closing date in respect of any
 19 Fastener Environmental Condition." Are you with
 20 me, your Honor?
 21 THE ARBITRATOR: Yes.
 22 Q. Just to keep this chain of
 23 provisions together, Mr. Miller, we start with
 24 the general indemnification provision which
 25 refers to Fastener Environmental Liabilities.

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1 DONALD MILLER - CROSS
 2 Now, we gone to the definition of that term and
 3 that definition in turn uses two terms of art,
 4 Environmental Laws and Fastener Environmental
 5 Condition; does it not?
 6 A. Yes it does.
 7 Q. Now let's look at the immediately
 8 preceding section 11.6 E iii which appears on
 9 2809.
 10 A. Right. It speaks to environmental
 11 contamination. Threatened environmental
 12 contamination.
 13 Q. Excuse me, Mr. Miller, you need to
 14 wait until I ask a question, if you don't mind.
 15 Then you need to answer my questions. This is
 16 cross, not direct. Okay.
 17 So E iii defines the term Fastener
 18 Environmental Condition one of the two terms of
 19 art which you need to understand in order to
 20 complete the definition of Fasteners
 21 Environmental Liability which we just looked at;
 22 right?
 23 A. Yes.
 24 Q. Fastener Environmental Condition,
 25 if you go down to subpart capital C, because

67 (Pages 2377 to 2380)

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1 DONALD MILLER - CROSS
 2 there is a series of clauses that define this
 3 term, if you look at capital C, which is five
 4 lines up from the bottom of the page, you see
 5 that one of the definitions, components of the
 6 definition is "Any violation or alleged
 7 violation of, or non-compliance or alleged
 8 non-compliance with applicable Environmental
 9 Law." Right? Is that correct?
 10 A. You correctly read C.
 11 Q. So I think we established, I hope
 12 you will agree with me, if you are trying to
 13 wind through these provisions to understand
 14 Fasteners Environmental Liability, the term of
 15 art in the indemnification clause, you go to
 16 Fastener Environmental Liabilities definition
 17 and that in turn defines two terms Fasteners
 18 Environmental Condition which we just looked at
 19 and also Environmental Law; correct?
 20 A. Yes.
 21 Q. So now we have seen two of those
 22 provisions, each refers to both sub iii and sub
 23 iv each refers to Environmental Law. That term
 24 of art is defined in the agreement in a subpart
 25 of 3.24 which you looked at on

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1 DONALD MILLER - CROSS
 2 direct-examination; correct yes?
 3 A. Yes.
 4 Q. Let's look at page 2767 of the same
 5 agreement because that is the definition of
 6 Environmental Law which is referred to in all
 7 these other provisions.
 8 A. Sorry, would you give me the
 9 section number.
 10 Q. Section number is 3.24G as in
 11 George, little ii. I will wait for minute so
 12 the judge can get there. Are you there, your
 13 Honor?
 14 THE ARBITRATOR: Yes.
 15 Q. So all of those sections take us to
 16 this term of art, Environmental Law. This is
 17 the section you were talking to Mr. Zurofsky
 18 about a few moments ago; correct?
 19 A. Yes.
 20 Q. It is your testimony that the
 21 reference to sub, in subsection little b as in
 22 boy of this particular section which defines
 23 Environmental Law, the words of which are
 24 "Workplace health or safety" is only workplace
 25 health or safety that is related to

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1 DONALD MILLER - CROSS
 2 environmental issues, ground, air and water,
 3 that is your testimony; correct?
 4 A. Yes.
 5 Q. Now subpart A, you would agree with
 6 me, little a in that same section talks about
 7 environmental issues, pollution or protection of
 8 the environment or natural resources; correct?
 9 A. Yes.
 10 Q. And subpart C also refers to
 11 environmental issues, exposure to hazardous
 12 materials; correct?
 13 A. Yes.
 14 Q. Now you would agree with me,
 15 wouldn't you, under your reading of this
 16 definition any workplace health or safety issue
 17 that you say are the only issues covered under
 18 the indemnity would either involve pollution or
 19 protection of the environment or natural
 20 resources or would involve exposure of persons
 21 or property to hazardous materials; wouldn't it?
 22 A. There is an overlap, but no. The
 23 answer is no.
 24 Q. The answer is no. Okay.
 25 A. A overlaps --

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1 DONALD MILLER - CROSS
 2 Q. You answered my question. There is
 3 an overlap; correct?
 4 A. Yes.
 5 Q. So it is your testimony that in
 6 this section little a, little b, little C are
 7 not separate mutually exclusive provisions, they
 8 overlap in this section of the agreement;
 9 correct?
 10 A. This pertains to environmental
 11 matters. All of the sections you pointed out
 12 use the word environmental. Environmental, if
 13 you look at the definitions in section 11.6E the
 14 definitions are environmental action. Talks
 15 about cleanup, governmental response costs,
 16 natural resource damages, property damage.
 17 If you look under Environmental
 18 Contamination, it talks about hazardous
 19 materials in soil, surface water, groundwater,
 20 sediments or other environmental media.
 21 Q. Mr. Miller --
 22 A. I am not done.
 23 Q. No, you are done because you have
 24 to answer my questions and not make speeches.
 25 THE ARBITRATOR: Just minute,

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1 DONALD MILLER - CROSS
2 please. He does have to answer your questions,
3 Mr. Chesler, but I think he can elaborate on
4 them.

5 MR. CHESLER: Excuse me, your
6 Honor.

7 THE ARBITRATOR: Are you
8 maintaining he did not answer your question?

9 MR. CHESLER: I do indeed.

10 THE ARBITRATOR: Then rephrase
11 your question.

12 MR. CHESLER: I will reask the
13 same question because he didn't answer it.

14 THE ARBITRATOR: Yes.

15 Q. Do you agree with me, sir, yes or
16 no, that under your interpretation of 3.24
17 subsections little a, little b and little c
18 overlap they are not mutually exclusive?

19 A. There is some overlap with respect
20 to certain matters.

21 Q. Thank you. Now --

22 A. Now may I finish.

23 THE ARBITRATOR: You want to
24 elaborate on that, Mr. Miller?

25 THE WITNESS: On that question,

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1 DONALD MILLER - CROSS
2 introduced drafts of these agreements, there is
3 no Bates stamp on this. It has never been
4 produced to us before.

5 Mr. Slifkin was referring to trial
6 by ambush yesterday. Mr. Miller was not deposed
7 about these drafts, Mr. Miller has not had a
8 chance to review these drafts or any notice they
9 might be coming to him. This is inappropriate
10 and objectionable.

11 MR. CHESLER: May I respond, your
12 Honor. If your Honor looks at the document you
13 will see this supposed ambush is based upon a
14 document prepared and sent by Cahill Gordon &
15 Reindel, the lawyers who just objected. There
16 is no surprise here.

17 This is their own document with
18 their own comments on it. We can't surprise
19 them on cross-examination with their own
20 document unless they haven't prepared their
21 witness. This came from them to us. It has
22 nothing to do with any comments going back from
23 us to them. Which is the subject counsel is
24 referring to. And in fact they withdrew that
25 request. At least as I learned how to

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1 DONALD MILLER - CROSS
2 no. I'm sorry.

3 MR. CHESLER: That is the same
4 question I asked before.

5 Q. Now, isn't it in fact the case,
6 sir, that Fairchild, during the negotiations of
7 this very section sought to have subpart B
8 stricken entirely?

9 A. I don't specifically recall.

10 Q. Okay. Let me see if I can refresh
11 your recollection. Let me show you what we have
12 marked for identification as Alcoa Exhibit 150.

13 MR. ZUROFSKY: Your Honor, I am
14 going to object to this exhibit. I will tell
15 you what it is. It is actually a pretty serious
16 one. If you recall your Honor we asked for
17 negotiation documents related to the drafting of
18 the agreement. We had a back and forth before
19 your Honor before the hearing started.

20 One of the things that was told to
21 us well we will give you negotiation documents
22 we are not giving you drafts, we presume people
23 have drafts, whatever. That is something where
24 it was left but from that date until now we
25 never at the deposition there never been

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1 DONALD MILLER - CROSS
2 cross-examine, witnesses your Honor, you impeach
3 them with their own documents, not what we spent
4 a week listening to during our case showing
5 witnesses documents they never seen before, that
6 they hadn't written or received.

7 This is their document from their
8 counsel with their comments. And it is flatly
9 inconsistent with the testimony this witness
10 gave under oath within the last hour. I have an
11 absolute right respectfully to cross-examine him
12 with it and impeach his credibility.

13 MR. ZUROFSKY: The problem we have
14 with, quite frankly, now I just remembered, I
15 remembered on that phone call when we were in
16 front of you I said, fine, we will assume drafts
17 from the files, which you will let us know if
18 you are going to use them. That is something I
19 discussed on that phone call with your Honor. I
20 remember this because we specifically asked to
21 know about what negotiation documents were going
22 to come.

23 My problem is not that this is a
24 document we may or may not have had, my problem
25 is the fact Mr. Miller was deposed on these

69 (Pages 2385 to 2388)

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1 DONALD MILLER - CROSS
2 topics, Mr. Miller specifically addressed this
3 issue, counsel is springing it on us right now
4 without any chance to have Mr. Miller review it
5 or other documents which may in fact show other
6 things that may fall in this category. That is
7 my problem with it.

8 This is something we totally
9 anticipated and in fact are now getting
10 surprised in terms of the fact they may do this
11 and ask for it now we are getting surprised with
12 it.

13 MR. CHESLER: My colleague just
14 defined cross-examination. We have no
15 obligation to tell a witness at his deposition
16 what we intend to do on cross-examination. At
17 least as I understand the process. That is
18 usually the last thing you do at a deposition.

19 This is their document from their
20 own lawyers with their own letterhead of their
21 comments. It is inconsistent with what the
22 witness has testified.

23 THE ARBITRATOR: The witness said
24 he didn't recall whether there had been any such
25 effort.

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1 DONALD MILLER - CROSS
2 MR. CHESLER: No, your Honor, it
3 is inconsistent with his definition of 3.24. I
4 can't make the point and argue it to you, your
5 Honor, unless I can conduct my
6 cross-examination.

7 MR. ZUROFSKY: In light of these
8 circumstances, if you are going to allow it, I
9 strenuously object to allowance of this
10 particularly because we were very clear
11 documents would be part of production, it would
12 be told to the other side that was the universe
13 of issues, we were all very clear.

14 If your Honor is going to allow I
15 want to reserve the right there are other draft
16 that might or might not be relevant here, I
17 would like to have the right to have Mr. Miller
18 answer some questions on redirect with respect
19 to those drafts if your Honor is going to allow
20 this.

21 THE ARBITRATOR: In responding to
22 document requests, was there any statement
23 either party would produce documents that were
24 already in possession of other party?

25 MR. ZUROFSKY: What Mr. Slifkin

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1 DONALD MILLER - CROSS
2 said we are not going to produce drafts. When
3 we asked for negotiation documents he said we
4 are not going to produce drafts because they are
5 in the files of each other party. We said fine,
6 with the condition we would know about it
7 beforehand. I recall that.

8 I don't remember if it was in
9 conversation with your Honor. I did say fine,
10 we don't want to get surprised we want to know.

11 MR. SLIFKIN: It is certainly
12 true, your Honor, we had that conversation, the
13 first part of the conversation that Mr. Zurofsky
14 mentioned. We weren't going to exchange with
15 each other the stuff that was already in each
16 other's files. The stuff we already exchanged
17 where the parties were negotiating the
18 agreement.

19 In fact that is a point raised on
20 their motion to compel where we had a conference
21 call before your Honor Mr. Zurofsky said that is
22 a very good point we are not going to exchange
23 stuff we already got. We agreed not to do that.

24 Of course there was no agreement we
25 would tell them what is already in their file.

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1 DONALD MILLER - CROSS
2 We assume they would look at their file and see
3 what there is in their files with their
4 letterhead.

5 THE ARBITRATOR: I will allow the
6 document to be introduced. There was agreement
7 documents in your possession would not have to
8 be produced again.

9 MR. ZUROFSKY: On that point, your
10 Honor, one response, if I might. We actually
11 made that point. Alcoa, insisted for example,
12 with correspondence between Ms. Hall and Mr.
13 Lease, we actually made that point, you guys
14 already have the correspondence. They said no,
15 no, no, we want your copies.

16 We produced from our production
17 those documents. That is something they
18 insisted on. I don't think Mr. Slifkin's
19 characterization is entire fulsome.

20 THE ARBITRATOR: You may have done
21 that in that case. In this case there was no
22 understanding you were going to exchange drafts.
23 I am going to allow it. You may examine him
24 further.

25 MR. CHESLER: Thank you, your

Page 2393

1 DONALD MILLER - CROSS
 2 Honor.
 3 (Alcoa Exhibit 150 was
 4 marked.)
 5 Q. Mr. Miller, would you turn to page
 6 35 of the draft agreement, please. That has a
 7 printed or typed page 35 at the bottom.
 8 A. Yes.
 9 Q. Do you have it, sir?
 10 A. I do.
 11 Q. Sorry, I couldn't hear you?
 12 A. Yes, I do.
 13 Q. Thank you. By the way, you see on
 14 the very first page of this document, the cover
 15 letter from the Cahill firm?
 16 A. Yes.
 17 Q. It says "Enclosed please find our
 18 preliminary comments to the May 2 draft of the
 19 Acquisition Agreement." Do you see that, sir?
 20 A. Would you read the next paragraph,
 21 please.
 22 Q. No. Not right now. You can do
 23 that on redirect if you like. Do you see the
 24 paragraph to which I directed your attention?
 25 A. Sorry, you're taking this out of

Page 2394

1 DONALD MILLER - CROSS
 2 context. I believe you will be misleading the
 3 court.
 4 THE ARBITRATOR: You have to just
 5 answer his questions, Mr. Miller. I can read
 6 it. I just read it.
 7 THE WITNESS: Thank you, I'm
 8 sorry.
 9 Q. Now would you answer my question.
 10 A. Yes.
 11 Q. The answer is yes?
 12 A. Yes, I will answer your question.
 13 What was the question?
 14 Q. The question was do you see that on
 15 in the first sentence of your lawyer's letter it
 16 says "Enclosed please find our preliminary
 17 comments to the May 2 draft of the Acquisition
 18 Agreement?"
 19 A. Those are Cahill's comments.
 20 Q. Now let's go back to page 35.
 21 A. Yes.
 22 Q. 35 has among other things on it, a
 23 draft with comments of section 3.24G ii, the
 24 definition of Environmental Law; correct?
 25 A. Yes.

Page 2395

1 DONALD MILLER - CROSS
 2 Q. The subpart B workplace health or
 3 safety is stricken; correct?
 4 THE ARBITRATOR: I'm sorry, you're
 5 looking at page?
 6 MR. CHESLER: 35. They are
 7 numbered at the bottom, your Honor.
 8 THE ARBITRATOR: I see it.
 9 MR. CHESLER: It is almost
 10 obscured by someone's handwritten note.
 11 THE ARBITRATOR: What section are
 12 you looking at?
 13 MR. CHESLER: I was direct the
 14 witness' attention to 3.24 G ii, the portion at
 15 the very top of that same page.
 16 THE ARBITRATOR: Okay.
 17 MR. CHESLER: Do you have that,
 18 sir?
 19 THE ARBITRATOR: Yes.
 20 Q. My question, Mr. Miller, do you see
 21 that subpart B workplace health or safety is
 22 stricken?
 23 A. Yes.
 24 Q. Now, the date of this particular
 25 set of comments is May 6, 2002; correct?

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1 DONALD MILLER - CROSS
 2 A. Yes.
 3 Q. Obviously that comment of striking
 4 subsection B was not accepted because subsection
 5 B is in the final agreement as we just saw;
 6 correct?
 7 A. Correct. Although maybe the reason
 8 was -- but go ahead.
 9 Q. Let's see what another round of
 10 comments after that comment was not accepted
 11 looks like.
 12 (Alcoa Exhibit 151 was
 13 marked.)
 14 Q. I want you to look now at what we
 15 have marked as Alcoa Exhibit 151 for
 16 identification.
 17 You see, Mr. Miller, 151 begins
 18 with a letter from the Cahill firm dated May 24,
 19 2002. Do you see that, sir?
 20 A. Yes.
 21 Q. I'd like you to turn to page, these
 22 are handwritten numbers on this draft at bottom,
 23 page 50.
 24 A. Yes.
 25 Q. You see the first full paragraph on

71 (Pages 2393 to 2396)

Page 2397

1 DONALD MILLER - CROSS
 2 page 50 is a draft of 3.24 G ii; correct?
 3 A. Yes.
 4 Q. You see in this particular version
 5 it says "Environmental Law means any law of any
 6 government entity or any binding agreement with
 7 any government entity, relating to,"the comment
 8 says, "the pollution or protection of the
 9 environment or natural resources, including
 10 without limitation workplace health or safety
 11 or" then it goes on to talk about release
 12 hazardous materials.
 13 A. Yes.
 14 Q. First trying to eliminate
 15 subsection B all together, that obviously didn't
 16 fly. This draft from Cahill defines
 17 Environmental Law as "any law from any
 18 government entity relating to pollution or
 19 protection of the environment, including without
 20 limitation workplace health or safety."
 21 Correct?
 22 A. No.
 23 Q. That is not what it says? I will
 24 withdraw the question if you say no. I will try
 25 it again.

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1 DONALD MILLER - CROSS
 2 Does this draft, the draft of May
 3 24, 2002 define Environmental Law as any law of
 4 any government entity or binding agreement with
 5 any government entity relating to the pollution
 6 or protection of the environment or natural
 7 resources, including without limitation, two
 8 subordinate clauses, the first of which is
 9 "workplace health or safety," yes or no?
 10 A. Yes.
 11 Q. Now had Alcoa, represented by the
 12 Skadden lawyers, accepted this version of the
 13 comments from your side, then I take it you
 14 would agree with me that workplace health or
 15 safety would have been a subordinate clause to
 16 pollution or protection of the environment;
 17 wouldn't it? Yes or no.
 18 A. That is certainly an
 19 interpretation.
 20 Q. This is not the version of that
 21 definition which survived to the final agreement
 22 either; is it no?
 23 A. No.
 24 Q. In fact as we looked at in tab 1 of
 25 your book that you used on direct-examination,

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1 DONALD MILLER - CROSS
 2 the version of the definition that made it to
 3 the final agreement has a subpart A which deals
 4 with "pollution or protection of the
 5 environment," then a comma, subpart B,
 6 "workplace health or safety" and then the word
 7 "or," subpart C, "exposure of persons or
 8 property to hazardous material." That is the
 9 way that paragraph is actually structured;
 10 correct?
 11 A. Yes. That is the compromise
 12 language.
 13 Q. And, in fact, in fact each of the
 14 other provisions of the agreement throughout the
 15 agreement where a section has subparts separated
 16 by commas and letters, is characterized by those
 17 subparts being mutually exclusive of each other;
 18 isn't that so?
 19 A. No.
 20 Q. It is not? Okay. Let's look, for
 21 example, at subsection 9.1 B, if you would.
 22 That is on page 2798 is the Bates number in tab
 23 1 of your direct exam book.
 24 A. 9.1.
 25 Q. B. The section on termination do

Page 2400

1 DONALD MILLER - CROSS
 2 you see that?
 3 A. Yes.
 4 THE ARBITRATOR: What page is it
 5 on?
 6 MR. CHESLER: 2798, your Honor, is
 7 the Bates number, tab 1 of the direct book.
 8 Q. There subpart B has three sections
 9 to it, each one is numbered separately i, ii and
 10 iii; correct?
 11 A. Yes.
 12 Q. They are separate nonoverlapping
 13 provisions that make up subpart B of 9.1; aren't
 14 they?
 15 A. I have to think very seriously
 16 about that over a long period of time.
 17 Q. We don't want to take that much
 18 time.
 19 A. You might want to look at 9.2 A
 20 Romanette ii. Because those two do overlap.
 21 Q. Again, Mr. Miller, you and your
 22 lawyer can do what you wish on redirect. I
 23 appreciate it if you would answer my questions.
 24 A. Thank you.
 25 Q. Thank you. We can go through many

Page 2401

1 DONALD MILLER - CROSS
 2 provisions with mutually exclusive sections but
 3 we will leave that for post trial briefing.
 4 When we asked you at your
 5 deposition whether you recalled having
 6 conversations with the Alcoa people,
 7 Ms. Holloway and the others involved from Alcoa
 8 about section 3.24 G ii, the definition of
 9 Environmental Law --
 10 A. Yes.
 11 Q. -- you testified you didn't recall
 12 having such conversations with them about it.
 13 Do you recall that?
 14 A. Would you repeat the question,
 15 please.
 16 Q. Yes. When you were asked at your
 17 deposition whether you recalled having had
 18 conversations with the Alcoa representatives
 19 about the definition of Environmental Law in the
 20 agreement, you said you did not recall having
 21 such conversations, do you recall that?
 22 A. Yes. But I subsequently refreshed
 23 my recollection by looking at the notes.
 24 Q. You believe you had conversations
 25 with them about the meaning of this section?

Page 2402

1 DONALD MILLER - CROSS
 2 A. About the meaning of this section?
 3 Q. Yes. That was my question about
 4 the words of the definition of the Environmental
 5 Law in the agreement?
 6 A. Of course.
 7 Q. You believe you did?
 8 A. Yes, environmental meant
 9 environmental, water, air and ground.
 10 Q. But you didn't recall that at your
 11 deposition; correct? You didn't recall speaking
 12 to them about the words of the definition?
 13 A. I don't remember. I don't remember
 14 what I said with respect to that issue.
 15 Q. Okay. I want to ask you about the
 16 notes that you wrote and commented about. I
 17 just want to see which tab. I would like to
 18 direct your attention to tab 2 in your book.
 19 A. Yes.
 20 Q. These are your notes you say you
 21 took on June 10, 2002; correct?
 22 A. Yes.
 23 Q. These are notes of a meeting, as
 24 you testified on direct-examination, that took
 25 place with a number of Alcoa people, the names

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1 DONALD MILLER - CROSS
 2 of whom you listed at the top of the first page
 3 behind tab 2; correct?
 4 A. Yes.
 5 Q. Yet you would agree with me the
 6 notes as produced to us from that day are
 7 heavily redacted; correct? So if you look, for
 8 example on page 1224.
 9 A. Parts of the notes are redacted.
 10 Q. Let's look at 12224, but for the
 11 date and the name Phi, the entire page is
 12 redacted; isn't it?
 13 A. Yes.
 14 Q. These are notes you took at a
 15 meeting with my clients; right?
 16 A. Yes.
 17 MR. ZUROFSKY: Your Honor, just
 18 to, when we were talking about producing
 19 documents for Mr. Miller you will recall we
 20 asked you to have Mr. Miller be allowed to be a
 21 witness. You said yes. They had to depose him.
 22 I specifically raised the issue --
 23 I don't know where counsel going from this -- I
 24 said we are going to redact from the notes
 25 because of potential privilege issues. We don't

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1 DONALD MILLER - CROSS
 2 have time for full review anything that relates
 3 to this particular issue. Your Honor said that
 4 is exactly what we should do. That is what we
 5 did. I don't know where counsel going with
 6 this. That is a result of your ruling, your
 7 Honor.
 8 MR. CHESLER: Where I am going, I
 9 have no idea what is in these redactions. This
 10 witness has come forward and offered testimony
 11 about what supposedly was said at a meeting. He
 12 offered his contemporaneous notes, apparently to
 13 support that. I think they have a serious sword
 14 and shield at issue problem.
 15 THE ARBITRATOR: Do you have any
 16 objection to giving him the unredacted notes?
 17 MR. ZUROFSKY: I have to look at
 18 it. The problem is there is other items taken
 19 we haven't done a privilege review. Mr. Miller
 20 is the general counsel, it was something done on
 21 the basis --
 22 THE ARBITRATOR: I know there was
 23 a discussion about whether he would be allowed
 24 to testify. It was in that context we were
 25 limiting his testimony to certain subject

73 (Pages 2401 to 2404)

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1 DONALD MILLER - CROSS
2 matters. You said there were a lot of things in
3 there that didn't relate to that subject matter
4 you wanted to redact.

5 MR. ZUROFSKY: Right.

6 THE ARBITRATOR: I said that would
7 be fine. I don't think there would be any
8 question of attorney-client privilege, it would
9 be at a meeting of which there were six or eight
10 representatives of Alcoa present.

11 MR. ZUROFSKY: There are potential
12 work product issues we would need to look like
13 and things like that.

14 THE ARBITRATOR: Do you want to
15 take the afternoon recess and look at them? I
16 think in light of this gentleman's testimony he
17 ought to be able to see all the notes unless
18 there is some legitimate attorney-client
19 privilege issue you want to keep out.

20 MR. ZUROFSKY: That is fine. I
21 will have to look. I am not quite sure if I
22 have a clean set of them. I will have to look
23 for them. I am certainly happy to take a look.
24 I will let you know as soon as we can.

25 THE ARBITRATOR: Do you want to

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1 DONALD MILLER - CROSS
2 or unassumed properties."

3 Q. Yes, I can read it, too. My
4 question is does the first item refer to what
5 you define as environmental matters?

6 THE ARBITRATOR: The first item
7 below the number?

8 MR. CHESLER: Yes, the one
9 numbered 1 with the parentheses below the line.

10 A. I don't know because it says
11 "particularly." I think the answer is yes.

12 Q. You think the answer is yes?

13 A. Yes. I may have to change it as we
14 go along. I have to see.

15 Q. You think the answer is yes, but
16 you may have to change it?

17 A. Yes.

18 Q. The second item relates again to
19 what you understand to be environmental matters;
20 correct?

21 A. Yes.

22 Q. The third one relates to what you
23 understand to be environmental matters; correct?

24 A. Yes.

25 Q. The fourth one relates to what you

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1 DONALD MILLER - CROSS
2 continue at this point?

3 MR. CHESLER: I will continue on
4 some other issues.

5 THE ARBITRATOR: We will take that
6 the afternoon recess.

7 MR. CHESLER: Are we taking the
8 recess now?

9 THE ARBITRATOR: I thought you
10 were going to continue for a while. Let them
11 look. Maybe at quarter to 4, or whatever.

12 Q. Let me ask you some questions about
13 the notes we did get, since your counsel is
14 going to look at the ones we didn't get. Would
15 you look at the first page of tab 2, please.

16 A. Yes.

17 Q. You testified at some length about
18 the different numbered items that begin on the
19 middle of that page, do you recall that, Mr.
20 Miller?

21 A. Yes.

22 Q. The first item relates to what you
23 define as environmental matters; correct?

24 A. "Preclosing ours, post closing
25 theirs, particularly environmental liabilities

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1 DONALD MILLER - CROSS
2 understand to be environmental matters; correct?

3 A. Yes.

4 Q. Your testimony is the fifth one
5 doesn't; correct?

6 A. Correct.

7 Q. According to that fifth item, Alcoa
8 said to Fairchild at that meeting that there
9 were compliance issues for which they would give
10 you a list and it would be between 20 to \$40
11 million; correct?

12 A. Yes.

13 Q. Other than the little math piece
14 down at the bottom of that second page relating
15 to the reserves the 20 to \$40 million number is
16 the only dollar figure presented on these two
17 pages of your notes; isn't that right?

18 A. Yes.

19 Q. So when they went through all the
20 matters you say are environmental, they made no
21 mention of any money, because if they had you
22 would have written it down; correct?

23 A. I might have. I should have.

24 Q. You should have. It is not here;
25 is it?

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1 DONALD MILLER - CROSS
 2 A. No.
 3 Q. The only matter for which there is
 4 any money written down is the item for which you
 5 claim everybody understood there was no
 6 indemnity; right? Is that correct?
 7 A. There was no indemnity for those
 8 compliance matters.
 9 Q. The answer to my question is yes,
 10 that's correct?
 11 A. The answer is there was no
 12 indemnity for those compliance issues.
 13 Q. Let me try again. The only item --
 14 A. Look, it is very hard to answer
 15 your question because we asked for a list. Who
 16 knows -- and never received it. Would some of
 17 those things have been covered if which
 18 ultimately saw the list or were they covered if
 19 we saw the list, who knows? We never saw the
 20 list.
 21 Q. Oh, really. So some compliance
 22 issues might actually have been under the
 23 indemnity?
 24 A. I have no idea, depends what they
 25 called compliance issues.

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1 DONALD MILLER - CROSS
 2 Q. As you said before Ms. Holloway's
 3 notes actually used the phrase EHS in them, on
 4 the same day, didn't they?
 5 A. But she didn't use that phrase at
 6 meeting.
 7 Q. Mr. Miller, you have to try harder
 8 to answer my questions. My question was
 9 Ms. Holloway's notes of the meeting on the very
 10 same day reflect the phrase or the term EHS;
 11 don't they?
 12 A. Yes. But not a phrase --
 13 Q. You answered my question, Mr.
 14 Miller, the answer was yes.
 15 In your notes for the same day, the
 16 same meeting, the only item that has any dollar
 17 figure affixed to it except for the math at the
 18 bottom of that reserves is the compliance issues
 19 item that says 20 to \$40 million; correct?
 20 A. First of all, the --
 21 Q. Is that correct, sir?
 22 A. No.
 23 Q. It is not correct?
 24 A. No.
 25 Q. All right. The document will speak

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1 DONALD MILLER - CROSS
 2 for itself. The judge can decide whether that
 3 answer was accurate or not. In the same set of
 4 notes for the same day --
 5 A. You refer to except for the numbers
 6 at the bottom. The numbers at the bottom have
 7 to do with environmental liabilities. That is
 8 what the reserve was for.
 9 Q. I excepted that from my question.
 10 You understood that -- withdrawn.
 11 Look at item number 4 on 12223.
 12 Item numbered 4. That says "PCE and TCE use at
 13 St. Cosme and Fullerton want indemnity." Right?
 14 That is what it says?
 15 A. Yes.
 16 Q. Even as early as June 10, 2002
 17 before there's even a signed agreement Alcoa
 18 told you they wanted to be indemnified for
 19 potentially hazardous substances that had been
 20 in use in two of the facilities then owned by
 21 Fairchild; correct?
 22 A. Yes. That is also reflected in 1,
 23 2, and 3.
 24 Q. In fact Alcoa has requested
 25 indemnity in connection with the cleanup of PCE

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1 DONALD MILLER - CROSS
 2 and TCE at St. Cosme and Fullerton and Fairchild
 3 has refused to pay a dime; isn't that true? Is
 4 that true?
 5 A. No.
 6 Q. Not true. Okay.
 7 A. Fairchild has paid for Fullerton.
 8 Q. A pause does not mean you should
 9 continue answering unless I have another
 10 question.
 11 MR. ZUROFSKY: I, believe your
 12 Honor, he is actually answering the question.
 13 If you listen to what Mr. Miller said. He says
 14 he has paid for Fullerton.
 15 Q. You believe you have?
 16 A. Yes.
 17 Q. I take it you are referring to the
 18 price adjustments?
 19 A. No.
 20 Q. Apparently there is more than one.
 21 Let me ask you about the price adjustments. No,
 22 before I do that, I want to go to the topic of
 23 machine guarding.
 24 Now, Alcoa has sent a number of
 25 letters to Fairchild in which Alcoa has asked to

75 (Pages 2409 to 2412)

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1 DONALD MILLER - CROSS
 2 be indemnified for the costs associated with
 3 machine guarding at various facilities; correct?
 4 A. Yes.
 5 Q. Fairchild's response in each
 6 instance has been essentially we need more
 7 information; correct?
 8 A. In some instances, yes. In others
 9 we denied liability.
 10 Q. Well, I can show you the letters if
 11 we want to take the time. But on no less than
 12 three separate occasions in response to three
 13 separate letters from Mr. Lease, each asking for
 14 machine guarding indemnification at different
 15 facilities, Fairchild has responded we need more
 16 information before we can respond to your
 17 request; isn't that so? Is that so?
 18 A. We would not answer in a knee jerk
 19 way. Is that your question?
 20 Q. No.
 21 A. We would want to know what you are
 22 talking about before we gave you a definitive
 23 answer.
 24 Q. It is your position that my client
 25 is not indemnified for machine guarding, was

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1 DONALD MILLER - CROSS
 2 Q. You have the backside of the
 3 document?
 4 A. I do.
 5 Q. If you look down in the chart, item
 6 number 5 it says "Machine guarding does not meet
 7 regulatory requirements." Do you see that, sir?
 8 A. Yes.
 9 Q. That is pretty clear it was machine
 10 guarding, nothing to do with your definition of
 11 environmental; right?
 12 A. Correct.
 13 Q. In fact it cites the labor code as
 14 the regulatory citation in the second column;
 15 correct?
 16 A. Yes.
 17 Q. Now, it is your testimony, is it
 18 not, that as of March 4, 2003 when this letter
 19 was sent to you, it was Fairchild's position
 20 that machine guarding that does not meet
 21 regulatory requirements was not covered by the
 22 indemnity in the Purchase Agreement; correct?
 23 A. Yes.
 24 Q. Let's look at Alcoa Arbitration
 25 Exhibit 40. This is your response to that

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1 DONALD MILLER - CROSS
 2 never indemnified for machine guarding and
 3 absent an order from the judge in this matter
 4 you have no intention of paying for any costs
 5 associated with machine guarding; isn't that
 6 true?
 7 A. You confuse machine guarding and
 8 environmental.
 9 Q. No.
 10 A. You may well confuse machine
 11 guarding with something else which is covered.
 12 Q. Let's do this the long way then.
 13 Let's look at what has been previously marked as
 14 a document in bulk Exhibit C, volume 1, which I
 15 am going to show the witness. We have marked
 16 this. It says C volume 1 of 22, your Honor. It
 17 is the letter which I will identify for the
 18 record.
 19 Do you see, Mr. Miller this is a
 20 letter from John Lease to your colleague, then
 21 colleague, Mr. Hodge dated March 4, 2003?
 22 A. Uh-huh.
 23 Q. I would look at the back of the
 24 page, please.
 25 A. Right.

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1 DONALD MILLER - CROSS
 2 letter; is it not?
 3 A. Yes.
 4 Q. Is that your signature?
 5 A. Yes, it is.
 6 Q. You say "We received your letter."
 7 A. Correct.
 8 Q. "Our initial review based upon our
 9 previous understanding of environmental issues
 10 at St. Cosme leads us to question whether all
 11 the items listed in the table to your letter
 12 attached to your letter do fall within the ambit
 13 of 11.6 and 2, whether the estimated costs in
 14 that table are justified."
 15 A. Yes.
 16 Q. "So that we may more fully
 17 consider these issues, please provide us with
 18 specific and complete background documentation
 19 supporting the items and costs provided in the
 20 table. We will respond further as appropriate"
 21 etc. Right?
 22 A. Yes.
 23 Q. You knew, according to your
 24 testimony, the day you signed this letter that
 25 Fairchild's position was that the machine